SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 293

UNEXCELLED CHEMICAL CORPORATION FORMERLY UNEXCELLED MANUFACTURING COMPANY, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX

CITATIONS

Cases:

Statutes:

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The petitioner and the appellee below, Unexcelled Chemical Corporation, formerly Unexcelled Manufacturing Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on April 29, 1952.

Opinions Below

The opinion of the district court (R. 13-16) is reported at 99 F. Supp. 155. The opinion of the court of appeals (R. 46-56) is reported at 196 F. 2d 264.

Jurisdiction

The judgment of the court of appeals was entered on April 29, 1952. On July 22, 1952, the time for filing the

petition for a writ of certiorari was extended, by order of Mr. Justice Clark, to and including August 26, 1952 (R. 58). The jurisdiction of this Court was invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the two year statute of limitations provided in Section 6 of the Portal-to-Portal Act of 1947 is applicable to actions by the United States under the Walsh-Healey Public Contracts Act.

2. Whether, if applicable to an action by the United States for liquidated damages under the Walsh-Healey Act, the statute of limitations begins to run only after an administrative proceeding before the Department of Labor is terminated, or whether it begins to run upon the employment of minors prohibited by said Act.

Statutes Involved

The pertinent provisions of the Portal-to-Portal Act and the Walsh-Healey Public Contracts Act are set forth in the Appendix, *infra*, pp. 11-16.

Statement

This action was instituted by the filing of a complaint by the Attorney General of the United States on January 27, 1950, seeking the recovery of the sum of $15,600.00 as "liquidated damages" together with interest and costs (R. 1-4). The action was brought under the Act of June 30, 1936, 49 Stat. 2036; 41 U. S. C. 35-45, known as the Walsh-Healey Act, which provides that any contract entered into by any agency of the United States for the manufacture or furnishing of materials, supplies or equipment in an amount

exceeding $10,000.00 shall contain certain stipulations, only two of which are pertinent, namely:

(a) That in the manufacture of the goods in question the provisions of the so-called Wage and Hour Law would be complied with, and

(b) That in the manufacture of the goods in question the so-called Child Labor Law would be complied with.

Section 36 of the Walsh-Healey Act provides that any breach or violation of such representation and stipulation shall render the party responsible therefor liable to the United States of America for liquidated damages in the sum of $10.00 per day for each male person under sixteen years of age and each female person under eighteen years of age knowingly employed in the performance of the contract.

The action was based on a decision of a Hearing Examiner of the Wage and Hour and Public Contract Divisions of the United States Department of Labor designated by the Secretary of Labor pursuant to 41 U. S. C. 39. The Hearing Examiner found and determined that during the years 1942 to 1945, inclusive, the defendant-appellee had knowingly employed certain named minors in the performance of Government contracts for a total of 1,560 days contrary to the provisions of said contracts. Said decision was rendered on February 25, 1949 (R. 22-44).

The answer denies that any sum is due the United States, and sets up two affirmative defenses (R. 5-6),

(1) That the defendant did not knowingly employ such minor persons, and that the finding to the contrary by the Labor Department Examiner is not supported by the preponderance of the evidence, and

(2) That the alleged wrongful employment of minors occurred more than two years prior to the commencement of the action, citing Par. 6, 61 Stat. 87, 29 U. S. C. 255—(The Portal-to-Portal Act).

Both parties moved for summary judgment on the pleadings and the record of the administrative proceedings conducted by the Department of Labor (R. 8-9 and 11-12).

The United States District Court for the District of New Jersey granted the motion of the defendant-appellee holding that this action was barred by the two-year period of limitations prescribed by the Portal-to-Portal Act, 29 U. S. C. 255 (R. 13-16). Consequently, it awarded judgment in favor of the defendant, *Unexcelled Chemical Corporation, formerly Unexcelled Manufacturing Company, Inc.* (R. 17-18).

The court of appeals reversed (R. 56-57). It held that actions by the United States to enforce child labor provisions of the Walsh-Healey Act are not barred by the two-year limitation of the Portal-to-Portal Act (R. 46-56).

Reasons for Granting the Writ

The petitioner submits that a writ of certiorari should be granted in this case under Subdivision 5 (b) of Rule 38 of this Honorable Court because the United States Court of Appeals for the Third Circuit has rendered a decision in conflict with the decisions of the United States Courts of Appeals for the Fourth and Fifth Circuits on the same question. In the instant case the United States Court of Appeals for the Third Circuit has held that actions by the United States to enforce the child labor provisions of the Walsh-Healey Act are not barred by the two-year limitation period of the Portal-to-Portal Act. This holding is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit, in the case of the *United States of America* v. *Lovknit Manufacturing Co., Inc., et al.*, 189 F. 2d 454, certiorari denied, 342 U. S. 896, Pet. for rehearing denied, 342 U. S. 915. In that case the Court held that the cause of action accrued not upon the findings of the administrative agency, but rather upon the alleged wrongful employment of minors and that the action was therefore barred by the

statute of limitations. Shortly thereafter the United States Court of Appeals for the Fourth Circuit, in the case of *United States of America* v. *Lance, Incorporated*, 190 F. 2d 204, certiorari denied, 342 U. S. 896, Pet. for rehearing denied, 342 U. S. 915, in reliance on the decision of the Court of Appeals for the Fifth Circuit in the *Lovknit* case, made a similar interpretation and held that the action was barred.

1. The United States Court of Appeals for the Third Circuit in holding that actions by the United States, to enforce the child labor provisions of the Walsh-Healey Act, are not barred by the two-year limitation period of the Portal-to-Portal Act reasoned as follows:

> "In so construing the Portal-to-Portal Act, we are fully cognizant of the fact that the Courts of Appeals for the Fourth and Fifth Circuits have reached the opposite conclusion. See United States v. Lovknit Mfg. Co., 189 F. 2d 454 (C. A. 5, 1951) cert. denied 342 U. S. 896; United States v. Lance, 190 F. 2d 204 (C. A. 4, 1951) cert. denied 342 U. S. 896. We do note, however, that the violations complained of in the Lovknit case comprised not only the wrongful employment of minors but also the failure to pay proper overtime compensation. The construction of Section 6 of the Portal-to-Portal Act here adopted apparently was not advanced in either of the above cases, the government contending that Section 6 does not apply to any action by the United States. If the construction we are adopting had been urged before those courts, different results might have ensued. With all due respect to our brethren of the Fourth and Fifth Circuits, we conclude that actions by the United States to enforce the child labor provisions of the Walsh-Healey Act are not barred by the two-year limitation period of the Portal-to-Portal Act."

The record discloses that in the *Lance* case the Government devoted a portion of its brief, in the United States Court of Appeals for the Fourth Circuit, (C. A. 4 Gov. brief, Case No. 6263 pp. 20-22) to the construction of Section 6

of the Portal-to-Portal Act and set forth at length its views that Section 6 of the Portal-to-Portal Act could not be read without reference to Section 1 (a) of the same act. Accordingly, it appears that the construction of Section 6 of the Portal-to-Portal Act as adopted by the United States Court of Appeals for the Third Circuit was presented to the United States Court of Appeals for the Fourth Circuit.

Similarly, in the *Lovknit* case (C. A. 5-Gov. brief, Case No. 13361 p. 19) the Government referred to Section 1 (a) of the Portal-to-Portal Act in support of its interpretation of Section 6. In both the *Lovknit* and *Lance* cases the Circuit Courts refused to accept the Government's contentions and held the statute of limitations applied.

On August 30, 1951, the United States filed petitions for writs of certiorari in both the *Lovknit* and *Lance* cases (Nos. 293 and 294 Oct. term, 1951). This Court denied the petitions.

It is submitted that the proper and reasonable construction of the Portal-to-Portal Act two-year limitation's period requires that it be applied to Government actions as determined by the Fourth and Fifth Circuits.

2. The authorities appear to support the position that the statute began to run at the time the minors were employed and began to work, and not from the date of the findings of the Secretary of Labor, or his representative.

In *Harp* v. *United States*, 173 F. 2d 761 (C. A. 10, 1949) certiorari denied, 338 U. S. 816, the court of appeals held that the suit was instituted less than 120 days after the enactment of the Portal-to-Portal Act, and therefore the suit was begun within the grace period fixed by Section 6 (c) of the act. However, the court went on to say:

> "It is insisted that the cause of action for liquidated damages under the Walsh-Healey Act accrues upon the breach of the contract; that the cause of action pleaded in the complaint herein accrued at the time the

several girls were employed and worked; that the cause of action was barred by limitations; and that the court erred in refusing to sustain the plea of limitations. For purposes of this case, it may be assumed without so deciding that the cause of action pleaded in the complaint accrued at the time of the employment of the girls in violation of the contract and of the Act, not upon the decision of the Secretary of Labor or his representative; and it may also be assumed without so deciding that section 6 of the Portal Act has application to an action of this kind instituted by the United States for liquidated damages under the Walsh-Healey Act . . . ."

Although the Court of Appeals for the Tenth Circuit decided the issue on the basis of the grace period provision of Section 6 of the Act, yet the court indicated by the assumptions that it made that the proper construction required the application of the limitations to the United States after the violation of the contract.

On November 5, 1951, this Court decided *McMahon* v. *United States*, 342 U. S. 2[illegible] In that case the Court construed the statute of limitations applicable to the Suits In Admiralty Act and held that the statute commenced running from the date of the injury rather than from the date of the administrative agency's disallowance of the claim.

On December 11, 1951, the Court denied the petitions for writs of certiorari to the United States Court of Appeals for the Fifth Circuit in the *Lovknit* case and to the United States Court of Appeals for the Fourth Circuit in the *Lance* case. On the same date, December 11, 1951, the Court denied the petition for rehearing in the case of *McMahon* v. *United States*, 342 U. S. 899.

On December 21, 1951, the Government filed a petition for rehearing in the *Lovknit* and *Lance* cases (Nos. 293 and 294, Oct. Term, 1951), asserting that the ruling in the *McMahon* case presented an issue quite different from the

issues in the *Lovknit* and *Lance* cases. The Government's position was that the *McMahon* decision could not be determinative of the issues in the *Lovknit* and *Lance* cases. In the latter cases the Government contended that if the statute of limitations applied to the United States then it began to run from the administrative agency's determination, whereas in the *McMahon* case the Government maintained that the statute of limitations commenced running from the date of the injury.

On January 2, 1952, in the case of *Pillsbury, et al.* v. *United Engineering Company, et al.*, 342 U. S. 197, this Court had the opportunity to construe a statute of limitations provision of the Longshoremen's and Harbor Worker's Compensation Act. There the issue was whether the limitations would begin to run after an administrative determination of the claimant's disability or from the date on which the claimant's injury occurred, and the Court held that the statute commenced to run from the date of injury. The Court declared that the petitioner's construction of permitting the statute of limitations to start at the conclusion of the administrative finding would have the effect of extending the limitations indefinitely. The Court went on to say that the provision would then be one of extension rather than limitation, and while it might be desirable for the statute to provide as petitioner contended, the power to change the statute was with Congress, not the Court.

On January 14, 1952, the Court denied the Government's petition for rehearing in the *Lovknit* and *Lance* cases.

The question of the effective date of the application of the statute of limitations in the *McMahon* and *Pillsbury* cases was before this Court at the time that the petitions for writs of certiorari were denied in the *Lovknit* and *Lance* cases.

It is submitted that the *McMahon* and *Pillsbury* cases are persuasive authority that the statute of limitations provi-

sions of the Portal-to-Portal Act should be construed to apply from the date of the violation of the contract and not from the date of the administrative agency's determination.

In the instant case the United States Court of Appeals for the Third Circuit has applied Section 6 of the Portal-to-Portal Act in such a manner as to deprive the petitioner of the benefit of the legislation which Congress enacted in the interest of setting limitations on the time in which contractors should be subject to suits for violations of the Walsh-Healey Act.

The alleged violations in the instant case occurred between November 3, 1942 and November 11, 1945 (R. 36-38). The Portal-to-Portal Act was passed on May 14, 1947, and provided that suit must be commenced within two years after the cause of action accrued or within 120 days after the enactment of the act. This suit was filed on January 27, 1950 (R. 1), more than four years after the cause of action accrued and more than two and one-half years after the alternate limitation of 120 days.

The application of Sections 6 and 6 (b and c) of the Portal-to-Portal Act, appendix, infra pp. 15-16, to the instant case is clear and free from ambiguity. Congress could not have more clearly demonstrated its intention that the statute of limitations of the Portal-to-Portal Act should apply to the liquidated damages provision of the Walsh-Healey Act. The Walsh-Healey Act provides that anyone who violates the act shall be liable to the United States of America for liquidated damages. No other liquidated damages of any kind are mentioned in the Walsh-Healey Act; therefore, when it refers to liquidated damages it could only refer to the liquidated damages for which there is liability to the United States.

The United States Court of Appeals for the Third Circuit refused to accept the clear language of Section 6 of the

Portal-to-Portal Act and read into that section certain qualifications. The qualifications are only present in Section 1 (a) of the Act which sets forth the findings of Congress and are not mentioned in the statute of limitations provisions.

The question presented to this Court is of importance to the petitioner, but it is equally important to all businesses and industries accepting contracts containing the standard provisions of the Walsh-Healey Act. In order for the petitioner and other businessmen to operate and manage their businesses efficiently and economically it is essential that a uniform ruling be promulgated concerning the application of this statute of limitations.

Conclusion

It is therefore respectfully submitted that this case is a proper one for review by certiorari in this Court and that the petition for writ of certiorari should be granted.

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APPENDIX

1. The pertinent portions of sections 1, 2, 4, 5 and 6 of the Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036, 41 U. S. C. §§ 35, 36, 38, 39) provide as follows:

Sec. 1. * * * That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

* * * * * * * * *

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week; * * *

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; * * *

* * * * * * * *

Sec. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each fe-

male person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

* * * * * * *

Sec. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act * * * and to prescribe rules and regulations with respect thereto. * * * The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

Sec. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

2. Sections 1(a) and 6 of the Portal-to-Portal Act of 1947 (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C., Supp. IV, §§ 251(a), 255) provide as follows:

Section. 1(a). The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, prac-

tices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest, and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

* * * * * * *

Sec. 6. Statute of Limitations.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

(b) if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years

after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations.